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No. 92-728

In The
**Supreme Court of the United States**
October Term, 1992

TWIN CITY FIRE INSURANCE CO., ET AL.,
Petitioners,

v.

SAMUEL F. FORTUNATO, COMMISSIONER
OF THE NEW JERSEY DEPARTMENT OF INSURANCE,
Respondent.

**Petition For Writ of Certiorari To The Supreme Court of New Jersey**

# MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* CONNECTICUT BUSINESS & INDUSTRY ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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December 24, 1992

## MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The Connecticut Business and Industry Association ("CBIA") requests leave to file the appended amicus brief in support of the petition for a writ of certiorari filed in this case. CBIA is a business association whose members reflect a broad cross section of businesses in Connecticut, the state with the highest concentration of insurance underwriters in the nation and so the state perhaps most affected by New Jersey's actions at issue.

CBIA is the largest business organization in Connecticut, having approximately 7,000 members that employ a total work force of over 700,000 employees. CBIA presents the views of its members on public policy and legal issues to legislative and judicial authorities.

Approximately eighteen of CBIA's members are insurance underwriters. Most of these firms do business in multiple states and so have a particularized and well-founded concern that the decision below may create a precedent inimical to their constitutional rights and their ability to structure their interstate operations most effectively. More generally, many of CBIA's members engage in interstate commerce and are concerned that the decision below may set a precedent encouraging other state laws which could be used to hold firms captive in states which they wish to leave for rational economic reasons.

CBIA believes its brief may offer the Court a disinterested analysis of the general significance of the issues raised by the petition which may assist the Court in ruling on the petition.

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## INTEREST OF AMICUS

The Connecticut Business and Industry Association ("CBIA") is the largest business organization in Connecticut, having approximately 7,000 members employing a total work force of over 700,000 employees. CBIA's members reflect a broad cross section of businesses in Connecticut, the state with the highest concentration of insurance underwriters in the nation. CBIA presents the views of its members on public policy and legal issues to legislative and judicial authorities.

Approximately eighteen of CBIA's members are insurance underwriters. Most of these firms do business in multiple states and have a particularized concern that the decision below may create a precedent inimical to their constitutional rights and ability to structure their interstate operations most effectively. More generally, many CBIA members engage in interstate commerce and are concerned that the decision below may encourage other state laws which could be used to hold firms captive in states which they wish to leave for rational economic reasons.

CBIA is also concerned about this case because it reflects a growing trend for states to deal with crises in one area of insurance by putting burdens on companies doing other lines of business. As noted in the Petition and in AIA's amicus brief, California, New York, Iowa, Massachusetts and Maine have tried or are considering conscripting insurers into remaining in the state or cross-subsidizing specific lines of business. Pet. at 9, n.8; 10, n.9. CBIA believes that the Petition here should be granted so its members and the community at large may obtain a definitive resolution of the legality of such efforts.

Pursuant to Supreme Court Rule 37.2, CBIA has obtained consent for the filing of this amicus brief from counsel for the petitioners. Counsel for the respondent has not consented, so a motion for leave to file this brief has been filed herewith.

## STATEMENT OF THE CASE

CBIA accepts and relies upon the statement of the case contained in the Petition. Pet. 3-8.

## SUMMARY OF ARGUMENT

The single issue presented by this case is whether a state can force an insurance company to continue to write a certain line of business against its will by threatening to revoke other insurance licenses owned by that company and by affiliated companies. Petitioner has analyzed this issue in terms of New Jersey's exercise of control over the company's "fundamental due process right to exit from an undeniable regulatory system." Pet. at 9. As an amicus, CBIA suggests that the impropriety of New Jersey's actions can also be seen by focussing on the other side of the equation, the constitutional invalidity of state's threat to other business licenses owned by Petitioner and its affiliates.

The threat to those other licenses can be analyzed in either of two ways. First, revocation of a business license because of an issue arising in an unrelated business is a denial of substantive due process. See infra, 3-7. Second, carrying through that threat and actually revoking those valuable licenses would be a "categorical" taking of property without compensation. See, infra 7-9.

The right to cease doing business is the ultimate response to unsatisfactory business conditions. As the Petition here notes, it is analogous to the constitutional right of individuals to travel from state to state. Pet. at 15. In this case, the automobile insurance market in New Jersey has virtually collapsed due to the state's misguided regulatory policies. New Jersey's effort to coerce Twin City and other insurers into foregoing their ultimate response and remaining in the state against their judgment of economic rationality has led the state into violating two different constitutional protections against arbitrary state power.

## ARGUMENT: REASONS FOR GRANTING THE WRIT

### I. NEW JERSEY CANNOT CONSTITUTIONALLY CONDITION OR THREATEN PETITIONERS' NON-AUTO LICENSES TO ACHIEVE AN END UNRELATED TO THE REASONS FOR WHICH THOSE LICENSES ARE REGULATED.

As the Petition makes clear, this case is about one thing only. The New Jersey automobile insurance market is a shambles and automobile insurers are eager to escape from an increasingly unprofitable situation. Only by prescribing "severe regulatory measures . . . in other words, strong medicine . . . ," Pet. A-20, will the state be able to keep a viable private automobile insurance market alive. In this case that "strong medicine" is the equivalent of hostage taking. In effect, New Jersey has said that unless Twin City consents to continue writing automobile insurance in the state under the onerous conditions specified by the euphemistically named FAIR Act, N.J. L. 1990, c. 8, it and all other affiliated insurance carriers must forfeit within five years all of their licenses to engage in non-automobile property and casualty insurance in the state (the "non-auto licenses"). Pet. A-7.[1]

This New Jersey cannot constitutionally do. While the Insurance Commissioner has broad power to regulate the business of insurance and to impose restrictions on the Twin City's non-auto licenses or even, if statutory conditions and procedures are met, to revoke those licenses, that licensing power does not permit the Commissioner to automatically impose whatever burdens he deems fit to remedy a given situation.

The state cannot condition Twin City's and its affiliates' non-

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[1] The "non-auto licenses" do include auto insurance licenses held by affiliated companies which cumulatively amount to a substantial fraction of the auto insurance business currently handled by Twin City. Pet. at 5, n.4.

auto licenses on their acquiescence with an unconstitutional condition. As Justice Scalia noted in Nollan v. California Coastal Commission, 483 U.S. 825, 837 (1987), even when the state is exercising its core function of protecting public safety, if it attempts to add an unrelated condition, such as a compelled forfeiture of property rights, it oversteps constitutional bounds.

Nollan involved California's attempt to leverage its right to deny a building permit into acquisition of an easement across private property. Justice Scalia conceded, for purposes of argument, that California could have denied the Nollans the permit they sought because the rebuilt house would block the public's view of the ocean and it could have conditioned the permit to protect the public's ability to see the beach by limiting the house's height. Id. at 835-36. But California failed "utterly" to show that the condition it did impose, a lateral easement across the land, would "further the end advanced as the justification for the prohibition." Id. at 837. What was required was a showing that the condition imposed "substantially advance[d]" the state interest relied on to justify the state's power. Id. at 834.

> "The lack of nexus between the condition and the original purpose of the [regulation] converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid public purpose, but without payment of compensation. [That is] 'an out-and-out plan of extortion.'"

Id. at 837.

Plainly the non-auto licenses to engage in the business of selling property and casualty insurance held by Twin City and its affiliates are property rights for constitutional purposes. See, e.g., Jordan v. United Insurance Company, 289 F. 2d 778, 781 (D.C. Cir. 1961); United American Ins. Co. v. Whaland, 337 A. 2d 358, 360 (N.H. 1975); Herz v. Degnan, 648 F. 2d 207, 208 (3rd. Cir.

1981). Furthermore, no extended discussion is required to show that revoking the non-auto licenses does not "substantially advance," indeed is totally unrelated to, the state's legitimate interest in regulating how Twin City and its affiliates use those licenses to engage in the property and casualty businesses. Revocation of those licenses would not benefit Twin City's policyholders or strengthen its ability to serve the public. Rather it would simply punish Twin City and its affiliates, and ultimately their shareholders and policyholders, for refusing to subsidize New Jersey's automobile insurance market.[2]

Paying money to meet the $ 3.3 billion accrued deficit of the New Jersey JUA, see Pet. A.-13, may be a valid government purpose, but it has no rational connection with the regulatory governmental purposes that justify the state's licensing of Twin City and its affiliates to underwrite their non-auto insurance.

That total "lack of nexus" between the state's interest in regulating Twin City's non-auto business activities and its interest in seeing that the JUA's debts are paid makes it unconstitutional for New Jersey to condition the non-auto licenses on continuation of Twin City's auto business in the state.[3] Nollan, supra. See also

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[2] The New Jersey Supreme Court candidly noted that if Twin City does flee the state, the forfeiture condition will open up an opportunity for other companies to acquire the non-auto business it and its affiliates must forego. Pet. A. 20. The court concluded that the lure of that prospect might make other insurers more willing to remain in or enter the state's auto market. Id.

[3] It might also be noted that, even on its own terms, New Jersey cannot show a rational connection between the perceived problem and its proposed solution. The purported "purpose" here was to prevent "market instability" upon Twin City's withdrawal. Pet. A-14. But the condition New Jersey imposed, forfeiture of all licenses owned by Twin City and its affiliates, including licenses to write auto insurance aggregating to a substantial fraction

(continued...)

CalFarms Insurance Co. v. Deukmejian, 771 P. 2d 1247, 1253-54 (Cal. 1989)(states cannot constitutionally force companies to use profits earned in prior years to support future confiscatory rates).[4]

By making the non-auto licenses hostage to Twin City's remaining in the New Jersey auto market, the state has forced Twin City and its affiliates to remain or enter into a business they have chosen not to undertake. As amicus AIA notes in its brief, this case presents a situation similar to that considered in Hartford Acc. & Indem. Co. v. Ingram, 226 S.E. 2d 498 (N.C. 1976). In Ingram North Carolina dealt with a crisis in the medical malpractice market by ordering all companies writing general liability insurance in the state to offer medical malpractice insurance. The North Carolina court held that law violated due process because it required companies to engage in an "entirely separate and distinct business" as a condition to their right to carry on entirely different businesses for which they were duly licensed and which they wanted to engage in. Id. at 507; see also Frost Trucking Co. v. Railroad Commission, 271 U.S. 583 (1926); Appleman, Insurance Law, §10413 at 297 (1982)(". . . it has been held that [the Insurance Commissioner] may not mandate that [a company] write a class of business it chooses not to undertake.")

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[3](...continued)
of Twin City's own share of the New Jersey market, Pet. at 5, n.4, would worsen rather than prevent instability. Since there is no rational nexus between the forfeiture of the non-auto licenses and the alleged market instability, forfeiture is a denial of substantive due process.

[4] CalFarms also rebuts any claim by the respondent that the Commissioner's action is not unconstitutional because it has not, by itself, forced Twin City into insolvency. A statutory proviso allowing those insurers that face insolvency to escape the impact of a state regulation that causes financial harm is not sufficient to save an otherwise unconstitutional measure. See id., 771 P. 2d at 1253-54.

In the end what New Jersey has done comes down to a ruthless attempt to exercise whatever coercive power the state has in order to force companies to sell auto insurance on the terms the state prescribes. Threatening Twin City's affiliates' non-auto licenses is not qualitatively different than having the Registry of Motor Vehicles announce that it will revoke the drivers licenses of all Twin City employees unless the company bends to the state's will.

New Jersey's power over insurers which it licenses is limited to regulating the conduct of the businesses for which they are licensed; it is not the untrammelled royal prerogative which the Stuart kings, to their ultimate cost, sought to exercise over their unwilling subjects.

CBIA respectfully suggests that granting the petition in this case would offer the Court an opportunity to clarify that Nollan teaches that the exercise of state power is limited to achieving the "same governmental purpose" for which that power was granted. Id. at 837.

## II. REVOCATION OF THE NON-AUTO LICENSES WOULD BE AN UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT COMPENSATION.

The Constitution prohibits a state from taking private property without payment of just compensation. U.S. Const. amend. V.[5] If New Jersey carries through its threat to revoke the non-auto licenses when Twin City leaves the state's auto market, it would be taking valuable property rights for which it will pay Twin City and its affiliates no compensation at all. As the court below conceded, the forfeited business is potentially attractive to other insurers and

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[5] The Takings Clause is applicable to the states by operation of the due process clause of the Fourteenth Amendment. See, e.g., Penn Central Transportation Co. v. New York City, 438 U.S. 104, 122 (1978).

forfeiture would cause a "significant economic loss" to Twin City and its affiliates. Pet. A-20, 28.

The Fifth Amendment was specifically designed to bar the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne only by the public as a whole." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980)[6]; see also, Yee v. Escondido, __ U.S. __, 118 L. Ed. 2d 153, 162 (1992)(Takings Clause requires compensation when a "regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.")

The Takings Clause bars the government from exacting a forced contribution to general government revenues which is not reasonably related to the costs of any service it is providing. Id. "That Clause stands as a shield against the arbitrary use of governmental power," Webb's Fabulous Pharmacies, 449 U.S. supra at 164, exactly the situation presented by New Jersey's effort to expropriate the value of the non-auto licenses and use it as a lure to encourage other insurers to sell auto insurance in the state. Pet. A-20.

While the court below was coy on the extent of the loss Twin City and its affiliates would suffer if they must forfeit the non-auto licenses, Pet. A-28, it is clear that as a matter of law, without those licenses, Twin City and its affiliates would be legally barred from engaging in the specific businesses covered by each forfeited license in the state of New Jersey. As discussed above, New Jersey law recognizes that a business license is a property right because it allows a person or business the valuable right to engage in business. Conversely, therefore, it is clear that a revoked license loses all economic value. Thus, as to each forfeited non-auto

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[6] Beckwith involved the state's effort to appropriate the interest that accrued on funds held by a court clerk in an interpleader action.

license held by Twin City and its affiliates, New Jersey has threatened to take the entire economic value of the license to its holder.

This case thus falls squarely within the logic of the Court's decision earlier this year in Lucas v. South Carolina Coastal Commission, __ U.S. __, 120 L. Ed 2d. 798, 813-15 (1992) which announced the "categorical" rule that compensation must be provided without further specific inquiry where the state has taken an entire property interest. The New Jersey Supreme Court's only response to the applicability of the "categorical" rule to this case was to distinguish Lucas as a "decision . . . involving real property . . . ." Pet. A-28.

That court was, of course, quite correct to note that Lucas did involve state regulation of real property. See, e.g. id., 120 L. Ed. 2d. at 815 ("when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking.")(emphasis in original). But the takings clause of the Fifth Amendment does not on its face distinguish between real property and the many other kinds of property which this Court has recognized are entitled to constitutional protection.

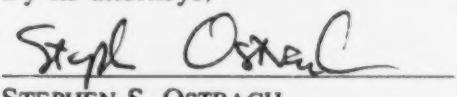
CBIA respectfully urges this Court grant the petition here to clarify whether Lucas is narrowly limited to interests in land or whether, as it logically should, it announces a constitutional rule that protects all forms of property from arbitrary state confiscation.

## CONCLUSION

For the reasons set forth above, CBIA respectfully requests that this Court grant the petition for a writ of certiorari and reverse the decision of the New Jersey Supreme Court.

DATED: Boston, Massachusetts: December 24, 1992.

Respectfully submitted,
CONNECTICUT BUSINESS &
INDUSTRY ASSOCIATION
By its attorneys,



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